No. 20200

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMBROSE DISTRIBUTING COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE RESPONDENT

WESTON & WESTON,
Attorneys for Respondent
Ambrose Distributing Co.

No. 20200

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMBROSE DISTRIBUTING COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE RESPONDENT

WESTON & WESTON,
Attorneys for Respondent
Ambrose Distributing Co.

INDEX

AUTHORITIES CITED

Cases:

Statute:

In the United States Court of Appeals
for the Ninth Circuit

No. 20200

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMBROSE DISTRIBUTING COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

---

BRIEF FOR THE RESPONDENT

JURISDICTION

Respondent agrees with the Petitioner's statement on jurisdiction.

STATEMENT OF THE CASE

The Board found that the Respondent herein, Ambrose Distributing Company, violated Section 8 (a) (1) of the Act by interrogating and threatening employees concerning their union activities, and promising them benefits for refraining from such activities. The Board also found that the Respondent violated Sections 8(a) (3 and (1) of the Act, by

discharging two employees, discouraging union activities.

The employer, Respondent herein, Ambrose Distributing Company, employs approximately thirty-eight truck drivers, located at Respondent's terminal in Wendell, Idaho (R. 19; Tr. 10-11). Sometime in September, one of the complainants, Richard Byrd, who was then employed by the Respondent, joined the Teamsters union. (R. 19; Tr. 11) The transcript indicates that thereafter and up until mid November, Mr. Byrd solicited other drivers to join this union (R. 19; Tr. 12). On December 12, 1963, the union filed a representation petition, and on February 18, 1964, the Board conducted an election which the union lost (R. 19; Tr. 4-5).

The Petitioner takes the position that certain statements allegedly made by Mr. Cooper, a supervisory personnel of the Respondent, and Mr. A. N. Ambrose, the owner of the company, have, in effect, interfered, restrained and coerced Respondent's employees, contrary to Section 8 as stated above. The first of these is a statement allegedly made by Mr. Ambrose in mid December of 1963. This statement was made to one Thomas Smith, a driver, wherein Mr. Smith was asked what he thought of the "union situation." (R. 20; Tr. 63). It was then brought out that Mr. Ambrose allegedly stated, "Now, whatever you fellows do, don't vote for the union." (R. 20; Tr. 63)

Counsel for the General Counsel has stated that

certain remarks made by the owner of Respondent herein, Mr. A. N. Ambrose, amounted to a threat that he was going to close the establishment for a period of two weeks while the election was being conducted (R. 21; Tr. 64-65). Counsel for the General Counsel construes this as a threat. Comment was also made that the statement of Mr. Ambrose that if there is a loss of the "Buttrey run" he has eight trucks sold in Utah. (R. 21; Tr. 64-65)

It was also brought out by Counsel for the General Counsel in his statement of the case, that Mr. Cooper told employee Ernest Barte, that if the union won the election Respondent would reduce his operation so that not more than five trucks would be kept running. (R. 19; Tr. 92)

Counsel for the General Counsel has also made reference to an alleged statement concerning a promise of remuneration in the event of the union's defeat. Mr. Ambrose categorically denies this (Tr. 104, 111). Counsel for the General Counsel has also made reference to alleged statements made by Mr. Cooper which constitute threats and coercion. These statements are not supported anywhere else, and were categorically denied by Mr. Ambrose. (Tr. 111)

DISCHARGES

The facts in this case with regard to the discharge of Richard Byrd are that he had a long record of unsatisfactory employment. The uncontradicted testimony of Mr. Ambrose shows that Byrd was not

a dependable employee. (Tr. p. 44, 111). In addition, the testimony shows that the only reason Mr. Byrd was hired at all was to pay off a debt previously owed the company (Tr. p. 111). The transcript also shows that sometime prior to Mr. Byrd's discharge, he was involved in an accident at a bridge somewhere in California. Testimony of Mr. Byrd discloses that according to company policy and rules this action was sufficient for a discharge. (Tr. 109). Subsequently, Mr. Byrd and another driver drove a truck and trailer to Butte, Montana. This trailer was then left at this destination and another trailer was picked up by the two drivers, and driven elsewhere. The owner, Mr. Ambrose, and some other men discovered that the front of the trailer had been damaged. (Tr. p. 108-109). Mr. Ambrose then confronted Mr. Byrd with this fact and accused him of causing the damage. (Tr. p. 109). At this point, the employee, Mr. Byrd, called Mr. Ambrose a "God damned liar." (Tr. p. 109). It was established that this act, in and of itself, independent of Mr. Byrd's guilt or innocence of the negligent and careless conduct, was sufficient to cause his discharge. (Tr. 109). It should also be noted that the transcript discloses that Mr. Byrd's own statement of the part he took in the disengaging of the truck from the trailer was negligent and careless. (Tr. p. 109).

With regard to the employee, Lawrence Smith, the record amply establishes that Smith was charged,

by unrefuted evidence, with the following:

(1) He improperly used company money without consent; (Tr. 114)

(2) He neglected making a written report on a chargeable accident which occurred in Canada, through his own negligence; (Tr. 112)

(3) He made false statements with regard to his medical discharge from a hospital and the nature of his illness; (Tr. 123, 128, 129)

(4) He took other work at a time when he was needed by the Respondent employer, thereby making himself unavailable, and, in effect, quitting his job with the Respondent. (Tr. 113, 114, 115)

ARGUMENT

I.

THE EVIDENCE ON THE RECORD DOES NOT SUPPORT THE BOARD'S FINDING THAT THE RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT.

As previously stated, it is Counsel for the General Counsel's position that the statement by Mr. Ambrose "Now, whatever you fellows do don't vote for the union" constitutes a threat or reprisal. It is respectfully submitted that this is nothing more than an exercise of an employer's right to freedom of speech and to inform his employees that management or the employer are not in favor of labor organizations. *NLRB v. Corning Glass Works*, 204

Fed. 2d 422 (CA-1; 1953); *Mayfair Mid-West, Inc.* 148 NLRB 155 (1964). In the *Mayfair case,* supra, the Board held that the employer's statement that "We don't want the union here and we don't have one," was not coercive in effect. Mr. Ambrose's statement is nothing more than an exhortation to the employees to not vote for the union. This is nothing more than an exercise of the employer's right to freedom of speech.

Counsel for the General Counsel has taken the statement of Mr. Ambrose out of context from the transcript on pages 64 and 65 and has attempted to construe that as a threat. In this same colloquially it was stated that if there is a loss of the "Buttrey run" he has eight trucks sold in Utah. In order to clarify the import of M. Ambrose's statement the full context of what was said should be quoted.

> "A. Is was the first part of February when we was working on this engine of the truck; Mr. Ambrose had asked me if I would like to work on the truck while it was in the shop, I told him sure.
>
> "So I believe we started this work on a Monday; then Tuesday, about the middle of the afternoon Mr. Ambrose come in and I asked him how the runs were coming along; he said, 'Well, I'm agoin' to park the trucks for two weeks, startin' tomorrow, everything that comes in will set for two weeks.'
>
> "I asked him what that was for and he said, 'It's for the benefit of the election;' he said, I want everybody to have an opportunity to vote.'
>
> "I said, 'Well, my financial condition is going

to be pretty tough on me layin' around for two weeks;'

"He said, 'Well, if this causes me to lose my Buttrey run,' he says, 'I've got eight trucks sold in Utah,' and he said, 'If you'd like for me to I'll see if I can get you on one of those.' "

(Tr. p. 65, lines 1-18)

It is perfectly obvious from reading the full statement that the reason why the trucks would be shut down for the two week period would be to allow these employees to exercise their rights guaranteed by Section 7 of the National Labor Relations Act and have an opportunity to vote for or against the union. However, by side comment, it was also brought out by the transcript that the two week lay-over would necessitate the sale of eight trucks in Utah, but he would sell one of them to the employee in order to allay his financial condition occasioned by the two week shut-down. How this can be construed as a threat; as coercion; or as a reprisal is beyond comprehension.

In another portion of Counsel for the General Counsel's argument, it is brought out that Mr. Cooper told an employee, Ernest Bartee, that reduced operations would be occasioned in the event the union won the election (R. 19; Tr. 92). In *NLRB v. O'Keefe and Merritt Manufacturing Company*, 173 Fed. 2d 445 (CA-9; 1949), the Ninth Circuit held that a speech to employees that a CIO victory was regrettable in light of the fact that the

employer would have difficulty in selling household appliances to be installed by AFL electricians, was not coercive or constituting interference. In *Penn-Mor Manufacturing Corporation*, 136 NLRB 647 (1962), the Board also held that an employer did not violate Section 8(a)(1) where the President of the corporation made a speech after the union's defeat in an election, to the effect that it would be financially disastrous for the employer to be subjected to repetition of production losses which occurred during the organizational period. The statements of Mr. Cooper certainly do not constitute threats or coercion. They are merely statements of the economic condition of the company in relation to union activity.

The other statements allegedly made by Mr. Ambrose and Mr. Cooper which were referred to at great length in the Counsel for the General Counsel's Brief have been categorically denied by Mr. Ambrose.

II.

THE EVIDENCE ON THE RECORD DOES NOT SUPPORT THE BOARD'S FINDING THAT THE RESPONDENT VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT.

(a) Byrd's discharge.

The question before this Court with regard to the discharge of Mr. Byrd is whether or not the discharge was motivated because of Mr. Byrd's union

activity, or because of his misconduct as an employee. General Counsel has the burden of proving by the preponderance of the evidence that employer's conduct in discharging employees was motivated by anti-union considerations. *Radio Industries*, 101 NLRB 912 (1952); *Teetrad Company*, 125 NLRB No. 61 (1959), *Finnmore Corporation*, 131 NLRB (No. 84) (1961).

It is respectfully submitted that General Counsel has not carried this burden of proof. It has also been held that it is proper to discharge an employee because of negligence in operating machinery. *NLRB v. Burningham Publishing Company*, 262 Fed. 2d 2 (CA-5; 1959); *Dannen Grain and Milling Elevator Company v. NLRB*, 130 Fed. 2d 321 (CA-8; 1942).

In *Ferrell-Hicks Chevrolet, Inc.* 142 NLRB (No. 21) (1963), the Board held that disrespectful remarks to superiors was sufficient grounds for discharge of an employee.

The undisputed evidence in this case discloses that Mr. Byrd engaged in negligent, careless and improper conduct with regard to the use of trucks. (Tr. 108, 109). It is shown in the transcript that Mr. Byrd left or quit his job in the middle of a run with a load of merchandise on the truck. (Tr. 111) The record also discloses that when the employer questioned him concerning his use of the equipment Mr. Byrd chastized his superior with profanity and disrespectful remarks. (Tr. 109)

(b) Smith's discharge.

With the evidence in this record with regard to Mr. Smith's activities and the poor character of his work, it is difficult to believe that anything other than the caliber of his performance motivated his dismissal. The record as referred to on pages 4 and 5 of Respondent's statement of the case show that he improperly used company money, failed to make a written report of a chargeable accident which occurred through his negligence, and which increases the employer's insurance rates; made false statements with regard to his physical condition and intentionally sought other employment at a time when Respondent-employer needed his services, thereby making himself unavailable, and, in effect, quitting his job. There can be very little question but what any one of these grounds, taken alone, is sufficient for discharging an employee. However, Counsel for the General Counsel has taken the position in both instances, i.e. Byrd and Smith, that even though the actions of the employees were improper, the antipathy of the employer toward the union made the discharges illegal. In *NRLB v. Burningham Publishing Company,* 262 Fed. 2d 2 (CA-5, 1958), the Fifth Circuit Court of Appeals propounded the rule that if a man has given his employer just cause for his discharge the Board cannot save him from the consequences by showing that he was pro-union and his employer anti-union.

"We have no doubt that the Burningham Publishing Company was glad to get rid of Ed-

wards. But the Company has a right to operate its plant efficiently. If an employee is both inefficient and engaged in union activities, that is a coincidence that does not destroy the just cause for his discharge. We cannot say, and the evidence does not support the conclusion that the Board can say: 'Edwards was fired because the company's officials had an anti-union animus against Edwards.

"The evidence shows beyond a doubt that Edwards left his presses during working hours."

NLRB v. Burningham Publishing Company, 262 Fed. 2d (CA-5; 1959), at p. 9.

This rule was cited with approval and followed in *Frosty Morn Meats, Inc. v. NLRB,* 296 Fed. 2d 617 (5th Circuit; 1961); *NLRB v. Atlanta Coca-Cola Bottling Company,* 239 Fed. 2d 300 (5th Cir.; 1961); *Miller Electric and Manufacturing Company, Inc. v. NLRB,* 265 Fed. 2d 225 (7th Circuit; 1959). In the *Frosty Morn Meats, Inc.*, case, supra, the following was stated by the Fifth Circuit with regard to the application of the *Burningham* rule.

"When an employee gives his employer as much reason to fire him as Judkins did, by refusing to follow instructions and by giving not only his supervisor, but also his fellow employees the impression that he was uncooperative, there is no basis for the conclusion that the employer has treated him differently than he would have treated a non-union employee. As a speculative matter, it may or may not be true that union animus loomed larger in the employer's motivation than Judkins' short-comings as a worker.

> When the evidence of just cause for discharge is as great as it is here, the record as a whole does not support the conclusion that the discharged employee was deprived of any right because of union activities. The power of reinstatement is remedial. It is not punitive. It is not to penalize an employer for anti-unionism by forcing on the payroll an employee unfit to stay on the job."
>
> *Frosty Morn Meats, Inc., v. NLRB*, 296 Fed. 2d 617, at p. 621.

It is respectfully submitted that even though Mr. Ambrose and Mr. Cooper do harbor anti-union attitudes or animus, the record in this case is so replete with evidence of negligent and careless acts; hostility and insubordination toward the employer; failure to obey company rules to the detriment of the Respondent company; falsehoods with regard to physical condition; and improper use of company money, that their reason for discharge far outweighs any union animus existing in the mind of the employer. To require this employer to retain both of these employees after their record as employees makes the provisions of Section 8(a)(3) of the Act punitive, rather than remedial.

CONCLUSION

In conclusion the undisputed testimony in the transcript discloses that the statements made by the employer to his employees during the organizational period were, in fact, nothing more than statements

protected by freedom of speech principles. Authority in this area permits the employer to inform the union that he is not in favor of unionization in any of its forms.

Other statements relied upon by Counsel for the General Counsel disclose that they have been taken out of context and do not constitute threats or promises of benefits or coercion in any form.

The other statements allegedly made have been categorically denied by the persons allegedly making them.

With regards to the discharges, the testimony in this case amply shows that due to the extreme degree of poor workmanship and bad attitude of both of the employees, that the only consideration that could have motivated the Respondent in discharging them with their poor performance.

For the reasons stated, it is respectfully submitted that the Board's Order should not be enforced.

DATED: This day of September, 1965.

WESTON & WESTON
By ELI A. WESTON
Member of the Firm
Attorneys for Respondent,
Ambrose Distributing Company

Residence and Post Office Address:
711½ Bannock Street
Boise, Idaho

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

ELI A. WESTON
Attorney for Respondent.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: